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No. [redacted]

IN THE SUPREME COURT

OF THE UNITED STATES.

AURORA VARGAS,

Defendant and PETITIONER,

vs.

THE PEOPLE OF THE
STATE OF CALIFORNIA,

Plaintiff and RESPONDENT.

PETITION FOR WRIT OF CERTIORARI

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TO THE HONORABLE EARL WARREN, CHIEF JUSTICE OF THE UNITED STATES AND TO THE ASSOCIATE JUSTICES OF THE SUPREME COURT:

Petitioner, Aurora Vargas, prays that a Writ of Certiorari be issued to review the Judgment of the Appellate Department of the Superior Court of the State of California in and for the County of Los Angeles entered in the above case on March 28, 1960.

OPINION BELOW

The opinion of the Appellate Department

of the Superior Court of Los Angeles County has not been officially reported.

JURISDICTION

The Judgment of the Appellate Department of the Superior Court of Los Angeles County was made and entered on March 28, 1960. A petition for a rehearing was denied on April 5, 1960. A copy of the Opinion of the Appellate Department of the Superior Court is appended to this Petition in the appendix, at pages A-1 ff.

The jurisdiction of this Court is invoked under 28 U. S. C. 1257 (3).

A criminal complaint was issued by the Municipal Court of Los Angeles Judicial District, (the subject matter of this proceeding) on May 8, 1959. In said complaint the Petitioner was charged with a violation of three counts of §242 of the California Penal Code (battery), and of a violation of one count of §415 of the Penal Code (disturbance of the peace). Petitioner was found guilty of each of said counts. A Motion in arrest of judgment and for a new trial were each respectively denied by the trial court.

Petitioner was sentenced to 30 days in jail as to Count I; a fine of $250.00 or in lieu of payment, 50 days in the City Jail as to Count II; a fine of $250.00 or 50 days in jail in lieu of payment as to Count III; 90 days in jail, sentence suspended and petitioner placed on summary probation for a period of three years as to Count IV.

Thereafter, an appeal was timely taken to the Appellate Department of the Superior Court. The Appellate Department affirmed the judgment of the Municipal Court as to Counts I, II and III and reversed as to Count IV. A petition for a rehearing was timely filed and denied on April 5, 1960. On July 5, 1960, this Court, the Honorable Associate Justice Hugo L. Black, signed an order extending the time for filing a Petition for Writ of Certiorari in the above case to and including August 8, 1960.

STATEMENT

Petitioner is the daughter of one Manuel and Avrana Arechiga who at the time of the events described in the above-mentioned complaint, were in possession of a piece of property situated in what is popularly known as Chavez Ravine. Petitioner's parents have been the owners of this property since 1923. In 1951, the Housing Authority of the City of Los Angeles instituted condemnation proceedings against Petitioner's parents alleging in the complaint that said property was required for a public housing project. Thereafter The Housing Authority obtained an Interlocutory Judgment in condemnation against your Petitioner's parents and prematurely deposited the amount of the award without interest into court before the interlocutory decree had become final. This deposit was made without notice to the parents of the Petitioner. Thereafter, the Housing Authority again without notice to the parents of Petitioner, prematurely applied to a court commissioner to issue a final order of condemnation without disclosing to the commissioner that the Housing Authority had

failed to deposit any interest with the amount of the award and was applying for the entry of the final order prior to the time that the Interlocutory Judgment had become final. Petitioner's parents at no time accepted the deposit made with the Clerk of the Court and the funds deposited by the Housing Authority have remained in the possession of the Clerk of the Court continuously ever since these funds were first deposited with the Clerk and are still in the possession of the Clerk. To this date the Housing Authority has failed to deposit into court or pay to the parents of Petitioner, any interest on said award.

Before the final order in condemnation became final the Congress of the United States passed a Bill on April 22, 1953, the legal effect of which was to authorize the Housing Authority to eliminate the land of the Petitioner's parents for use as a public housing project. Petitioner's parents subsequently instituted legal proceedings to set aside the Interloctutory Judgment in condemnation but a judgment of dismissal was rendered and entered following a ruling sustaining a demurrer without leave to amend which was affirmed on appeal.

On May 21, 1959, a second action was filed by the parents of your Petitioner in the Superior Court of Los Angeles to set aside the final order of condemnation on the ground that said final order had been procured by extrinsic fraud, practised upon the Superior Court.

The Superior Court sustained a demurrer without leave to amend to this complaint. From

a judgment of dismissal, an appeal was taken to the District Court of Appeal of the Second Appellate District, State of California, and said appeal was taken under submission by the District Court of Appeal and is now pending for decision.

On May 8, 1959, the parents of your Petitioner were then in possession of the property above referred to under a claim of right and believing in good faith that they had the lawful right to the possession of said premises and that any claims of the Housing Authority were not valid.

On May 8, 1959, approximately 20 deputy sheriffs acting in concert with great force and violence broke down the doors of the home of the parents of Petitioner and bodily removed Petitioner from the home.

The battery for which Petitioner was convicted occurred during the time that the Petitioner was being removed from the premises by four deputy sheriffs, two of whom were holding her by the arms and two by the legs and carrying her out of the house.

After Petitioner was carried out of the premises, she was handcuffed with her hands behind her back and pushed into a sheriff's automobile. While in the automobile she was slapped by one of the female deputy sheriffs in the mouth with great force so that her mouth began to bleed. After being slapped, Petitioner attempted to kick back at her assailant out of the window of the vehicle. Thereupon the deputy

sheriffs grabbed Petitioner's leg and held it while a second deputy rolled up the window so that petitioner's leg was caught between the metal top of the window and the glass, bruising her shinbone and injuring her painfully. That it was not until Petitioner began to scream from the pain and fright that the deputies finally rolled the window back down and pushed her foot back into the car. By this time the blood was streaming down Petitioner's mouth. The deputy sheriffs then drove the car in which affiant had been pushed on top of a hill in a secluded area in Chavez Ravine.

Thereupon the deputy sheriffs tightly closed all the windows in the automobile. It was a very warm day and Petitioner was perspiring profusely. It became very stifling. Petitioner and a co-defendant who had also been placed in the automobile with Petitioner begged the deputies to open the windows stating "Will you please roll the windows down and give us a little air, we can't breathe." One of the deputy sheriffs answered this request, stating, "You don't deserve any air." After being kept in the automobile for quite a long time, Petitioner's mouth was still bleeding and she was very thirsty. Petitioner asked one of the deputy sheriffs if she could please have a glass of water which was refused.

Petitioner was detained and confined in the automobile above described and in the automobile of the deputy sheriffs of the County of Los Angeles for more than one hour in the handcuffs. That Petitioner protested to the deputies to either take her to jail or to do something, as the hand-

cuffs were killing her, to which the deputy answered, "Just don't pull yourself or you'll get hurt more." Petitioner kept telling the deputy that the handcuffs were real tight and that they were hurting her, but the deputies refused to remove the handcuffs or take her to jail. After another long interval of time, Petitioner told one of the deputies that she had to go to a bathroom to which one of the male deputies answered, "You are big enough, you can hold it."

Petitioner was not given any drinking water at any time although she requested it again on several occasions. She was not allowed to go to a bathroom, or taken to a bathroom, although a police academy was situated close by to where she was being detained and was only a few hundred feet away from the place of detention.

That after approximately one hour on the hill some police officers arrived at which time the deputy sheriffs removed the handcuffs from Petitioner, and the police officers re-handcuffed her with her arms again behind her back. That at the time the police officer handcuffed the Petitioner she was perfectly quiet and had committed no offense in the presence of the officers, and had offered no resistance. This handcuffing took place in the presence of Petitioner's attorney who protested against the handcuffing of the Petitioner to which one of the police officers answered, "I am going to handcuff them regardless of what you say."

That after being handcuffed by the police

officers, Petitioner was again detained in an automobile, handcuffed, for more than an hour after which time she was driven to a police emergency station at her request that she was in need of medical attention. After Petitioner was taken to the receiving hospital it was only after the insistence of the doctor at the receiving hospital that the police officers removed her handcuffs from Petitioner's wrists. That Petitioner's wrists were badly bruised and very painful, her shin bone was bruised and painful, and her mouth was cut. She was taken to a jail and detained until approximately 7 p. m., at which time she was released on bail.

A complaint was issued against the Petitioner herein, charging Petitioner with a violation of §242 of the Penal Code of California (Battery, three counts), and one count of disturbing the peace.

During the trial, the Petitioner's counsel on her behalf, objected to the jurisdiction of the court to try the Petitioner for the offenses for which she had been charged on the ground that cruel and inhuman treatment had been inflicted upon her by officers of the sheriff's department and of the police department in violation of the Fourteenth Amendment of the United States Constitution and in violation of Article I, Section 13, Clause 6 of the California Constitution. This objection was overruled. (Clk. Tr. p. 130-132; p. 383, lines 13-18).

At the trial of the case, Petitioner's counsel offered to prove that a Writ of Possession which had been issued out of the Superior Court

and which was the Writ under which the deputy sheriffs ejected the Petitioner bodily from the premises of her parents was based upon a void judgment. (Clk. Tr., p. 181, line 8 to p. 182; p. 492, line 3 to p. 493, line 21; p. 509, lines 13-25; p. 521, lines 6-8).

Petitioner offered to prove that the Writ of Possession upon which she was ejected from the premises, was based on an invalid judgment in the following particulars:

1. That at no time was there deposited into court for the benefit of the parents of Petitioner by the plaintiff in the condemnation action, any interest on the award. (Clk. Tr., p. 425, line 23 to p. 427, line 14). That the award, without interest, was deposited prematurely and the final order entered prematurely. (Clk. Tr. p. 426, line 16 to p. 429, line 1; p. 473 to 476.)

With respect to the evidence offered to show cruel and inhuman treatment, the court instructed the Jury to disregard this evidence. (Clk. Tr., p. 430, lines 18-25).

The trial court took a contradictory and inconsistent position with the instructions to the jury. The court first instructed the jury, "You are also instructed in this vein of thinking, that any necessary force may be used to protect from wrongful injury of one's property or of oneself or a husband or a child or a parent or any relative or a member of one's family or of a ward or servant or master or guest. This also applies" the Court said, "naturally to an

unlawful injury or taking of property or injury to the person. (Clk. Tr., p. 686, lines 5-11)

The trial court then contradicted the foregoing instruction by giving the following instruction: "Now the law gives to a citizen a right of action against a sheriff for an unlawful exercise of his authority, if it be unlawful, but if the citizen attempts to decide for himself whether or not the sheriff is acting within the scope of his authority, he does so at his peril, because the law does not countenance a breach of the public peace in order to enforce a private right. Courts are created for the purpose of determining these rights, and any other rule would result in private battles going on in various times and places to the great inconvenience of the general public." (Rep. Tr. p. 686, lines 13-23).

The Court invaded the province of the jury by giving the foregoing instruction. "A public officer, acting in the performance of his duties if on the land of another, is there legally and is not a trespasser and has the right to use all the force which, from the surrounding circumstances, seems to him, as a reasonable person, to be necessary." (Rep. Tr., p. 686, line 24 to p. 687, line 2).

The Court refused to give the following instruction requested by the defendant:

Defendant's Requested Instruction No. 5

"I instruct you that the burden of proof is upon the prosecution to show that the

Writ of Possession which the deputy sheriffs were attempting to enforce was a lawful Writ of Possession based upon a valid judgment of the Superior Court. If you find that said Writ of Possession was not based upon a valid judgment of the Superior Court, then I instruct you that said Writ of Possession was unlawful and any resistance to the action of the deputy sheriff attempting to enforce said Writ was not a violation of §148 of the Penal Code. . . . "

The trial court rejected an offer of proof as to a conversation between the Lieutenant in charge of the sheriffs and one Pat Michaels, a television newscaster, wherein the witness had asked the Lieutenant why Petitioner had been removed and the Lieutenant had said to him, that they had asked her to leave, that she had refused to leave, so they bodily removed her. (Rep. Tr., p. 407, line 6 to p. 410, line 7).

The trial court refused to permit the impeachment of Sergeant Cable, a witness called by the defense for the purpose of identifying the arrest report which was dictated by the witness and which contradicted the testimony of the People's witnesses. This arrest report, Petitioner's counsel offered to show, recited that any physical resistance by Petitioner was committed after the deputy sheriffs started to remove her from the home of her parents and not before. (Clk. Tr. p. 544, lines 8-24). The trial court refused to permit the arrest report

to be introduced into evidence. (Clk. Tr., p. 547, lines 2-3).

The trial court sustained an objection to an offer of proof for the purpose of impeachment of a report prepared by Sergeant Cable. (Clk. Tr., p. 553, line 16 to p. 554, line 21).

The trial court sustained an objection to the introduction of the impeaching testimony. (Clk. Tr., p. 553, line 2) This ruling prevented the Petitioner herein from introducing into evidence the original arrest report which clearly indicated that Petitioner had offered no physical resistance until after the deputy sheriffs had picked the Petitioner up bodily and were carrying her out of the home.

In this the Appellate Department misconstrued the theory of Petitioner's constitutional rights. Petitioner does not contend that she has a constitutional right to attack officers serving process valid on its face irrespective of whether said process may be based upon a void judgment or fraud in its procurement. Petitioner does contend that when the officers serving process although valid on its face if based upon a void judgment or if procured by fraud or in violation of other constitutional provisions, that the person against whom the process is being enforced physically may resist and defend oneself when such defense is necessitated by a bodily assault committed by the officers.

STATEMENT DISCLOSING BASIS OF JURISDICTION

Jurisdiction is invoked under 28 USC, §1257(3). The Judgment of the Appellate Department of the Superior Court of Los Angeles County (the highest court of the state in an appeal from a judgment of the Municipal Court of the Los Angeles Judicial District) was entered on March 28, 1960. A Petition for a Rehearing was timely filed and was denied on April 5, 1960.

The conclusion of the Appellate Department of the Superior Court that a person commits a crime in resisting bodily eviction from her home irrespective as to whether the process may be based on a void judgment is at variance with principles announced by this Court.

THE FEDERAL QUESTIONS WERE TIMELY RAISED AND ARE SUBSTANTIAL

The Appellate Department of the Superior Court in affirming the judgment of conviction thereby approved the conviction despite the violation of the constitutional rights involved. By its decision the Appellate Department of the Superior Court approved a doctrine without legal precedent, to wit, that a person in her own home may not resist being evicted from her own premises under a writ of possession based upon a void judgment. The issue is an important one which may affect a great many cases, and the decision of the Municipal Court and the Appellate Department of the Superior Court seems clearly erroneous and is in direct conflict with numerous cases of the Appellate and Supreme Courts of California and of the Federal Courts and the highest courts from other jurisdictions. The decision is clearly contradictory and in conflict with the provisions of §§692 and 693 of the Penal Code and of §50 of the Civil Code of California.

Each and every one of the constitutional questions referred to above were raised before the trial court in a motion objecting to the jurisdiction of the trial court before the commencement of the trial, in a motion to set aside the verdict of the jury, and in a motion for a new trial, and on appeal before the Appellate Department of the Superior Court. The following specific quotations from the record show that the federal questions were timely and

properly raised:

(Clk. Tr. p. 130, Vol. I): "Mr. Silver: 'At this time, your Honor, we object to the jurisdiction of this Court to try the defendants or either of them for the offenses with which they have been charged on the following grounds: No. 1. That cruel and inhuman treatment was inflicted upon the defendants by officers of the Sheriff's Department and of the Police Department of the city in violation of the Fourteenth Amendment of the United States Constitution, and in violation of Article I, §6, of the State Constitution, that by reason of the cruel and unusual punishment that has been inflicted upon them there has been a denial of due process of law and the defendants are entitled to a dismissal of the charges pending against them without being compelled to defend the charges on the merits'."

(Clk. Tr., p. 181): "By Mr. Silver: . . . 'I will say to you that an interpretation which will uphold the prosecution of the case where it is undisputed that the writ is based upon a void judgment, which is a complete nullity, would be against the public policy of the State of California. It would be against the provisions of the Fourteenth Amendment of the United States Constitution. It would be a denial of due process of law of our State Constitution and I submit, your

Honor, that there is no legal precedent shown by the prosecution here to subject a person to the defense of a criminal case, where it is conceded -- it hasn't been refuted and I take it it is conceded -- that the writ is based upon a void judgment'."

(Clk. Tr., p. 337, line 15 ff):
"By Mr. Silver: 'This evidence, your Honor, was being presented by the defense as part of our defense that the constitutional rights of this defendant and of the second defendant have been infringed upon in violation of the Fourteenth Amendment of the United States Constitution and in violation of the due process clause of Article I, §6, Clause 13, of the State Constitution, as well as in violation of certain provisions of the Penal Code'."

(Clk. Tr. p.
"The Court: ' . . . Members of the jury, please give attention to this instruction and statement. The Court has stricken, as a matter of law, all of the testimony of the witness Vargas who was on the stand, all of the testimony relating to anything which occurred after leaving the scene of the residence at 1771 Malvena Street, and by "the scene" I mean everything that occurred at that location, either on the street or not. You are

instructed to disregard it."

The constitutional questions were raised in the proposed statement on appeal, Clerk's Transcript, pages 38-41.

The constitutional questions were raised by the Petitioner in Petitioner's opening points and authorities filed with the Appellate Department. (Clk. Tr. p. 70). The constitutional questions were again raised in Petitioner's petition for a rehearing with the Appellate Department of the Superior Court. (Clk. Tr., p. 60).

CASES BELIEVED TO SUSTAIN JURISDICTION

A state may not affirmatively authorize an unlawful eviction without violating the due process clause of the Fourteenth Amendment.

Wolf v. Colorado, 338 U.S. 25, 27.

"The security of one's privacy against arbitrary intrusion by the police * * * is basic to a free society."

Boyd v. United States, 116 U.S. 616, 635.

The start of abuse can "only be obviated by adhering to the rule that constitutional provisions for the security of the person and property should be liberally construed."

Frank v. Maryland, 359 U. S. 360, 363

"Against this background two protections emerge from the broad constitutional proscriptions of official invasion. The first of these is the right to be secure from intrusion into personal privacy. The right to shut the door on officials of the state unless their entry is under proper authority of law."

1. The denial of the right to offer evidence as to the alleged invalidity of the Writ of Possession thus nullifying the right of self-defense is contrary to "fundamental principles of liberty and justice."

Curran v. Delaware, 259 F. 2d 707

2. The giving of irreconcilable instructions to the jury on self-defense deprived Petitioner of a fair trial in violation of her right to due process of law under the Fourteenth Amendment.

Colon v. Puerto Rico, 256 F. 2d 393, 397.

3. Obtaining a conviction through false testimony allowed to go uncorrected.

Napue v. Illinois, 79 U. S. Ct. 1173.

Jones v. Kentucky, 97 F. 2d 335;

Mooney v. Holohan, 294 U. S. 103.

4. The suppression of evidence by the proesecution, favorable to the Petitioner.

Curran v. Delaware, 259 F. 2d 707;

Pyle v. Kansas, 317 U. S. 213;

U. S. v. Dye, 221 F. 2d 763;

U. S. v. Rutkin, 212 F. 2d 641.

Neither Sgt. Cable who signed the arrest report or Lieutenant Farrell who had stated to a newscaster that Petitioner had refused to leave the premises so they carried her out was called as a witness by the prosecution

No physicians were called to support the testimony of any of the complaining witnesses as to their alleged injuries.

Wesson v. U. S., 184 F. 2d 394;

Yaw v. U. S., 228 F. 2d 382;

Calif. Code of Civil Procedure, §1963, subd. 5 and 6

5. The denial of Petitioner's offer of proof to introduce the original arrest report which sustained her defense that the officers were the aggressors and that she resisted only in self-defense constitutes "fundamental unfairness".

Curran v. Delaware, 259 F. 2d 707

Roviaro v. United States,
353 U. S. 53, 61, 62.

6. The seizure of the land of Petitioner's parents based on a condemnation judgment without the payment of interest violated the Fourteenth Amendment.

Seaboard v. U. S., 261 U. S. 299;

Kieselbach v. Commissioner,
317 U. S. 399;

Jacobs v. U. S., 290 U. S. 13;

People v. Superior Court,
145 Cal. App. 2d 683;

Brown v. U. S., 263 U. S. 78.

7. The denial of Petitioner's offer to prove she was subjected to cruel and unusual treatment in violation of the Eighth and Fourteenth Amendments of the United States Constitution constituted "fundamental unfairness" of trial.

Screws v. U. S., 325 U. S. 91;

Weems v. U. S., 217 U. S. 349;

Johnson v. Dye, 175 F. 2d 250
(reversed on other grounds).

Francis v. Resivelier, 329 U. S.
459.

The Appellate Department of the Los Angeles Superior Court affirmed the conviction as to counts I, II and III, stating in its opinion that the Petitioner, "Resisted the enforcement of the Writ by kicking, striking or biting each of the officers." The Appellate Department without legal or supporting precedent after acknowledging that a person has a right to resist an unlawful arrest declared that he may not in defense of home or person resist from being ejected by force and violence, despite the fact that the Writ of Possession may be based upon a void judgment. The Appellate Department refused to pass upon the contentions advanced by Petitioner that the trial court had denied due process of law guaranteed by the California Constitution and by the Fourteenth Amendment of the United States Constitution.

In refusing to permit the Petitioner to introduce evidence to establish that the Writ of Possession was a void Writ and was based upon a void judgment, the Appellate Department said, "We do not know whether the judgment was void, but we do know that the Writ, a copy of which is in evidence, is valid on its face." "This," the court said, "was sufficient to protect the officers who served it."

The Appellate Department concluded contrary to the Fourth and Fourteenth Amendments of the United States as follows: "We hold that when an officer is armed with a Writ of Possession lawful on its face a person who resists the officer seeking to execute it is guilty of a crime."

The Appellate Department further concluded that the right of self-defense and the right to protect ones person and the person and property of ones' parents guaranteed by statute and by constitution did not exist in defending against an unlawful judgment so long as the Writ of Possession appeared on its face to be issued by a court of competent jurisdiction. The Appellate Department said, "The courtroom in the Civil action, not the place where the Writ is served, is the proper battle ground for testing the validity of the court order."

THE JUDGMENT CANNOT BE SUPPORTED ON A STATE GROUND

A. The Seizure of Plaintiff's Land By the City of Los Angeles Without the Prepayment of Interest on the Interlocutory Decree of Condemnation Constitutes a Violation of the Due Process Clause of the Fourteenth Amendment of the United States Constitution and Of Article I, Section 13, Clause 6 of the California Constitution.

In Air Line v. United States, 261 U.S 299, the United States Supreme Court said,

"It is obvious that the owner's right

to just compensation cannot be made to depend upon state statutory provisions . . . The requirement that just compensation shall be paid is comprehensive and includes all elements and no specific command to include interest is necessary when interest or its equivalent is part of just compensation."

In accord:

Shoeshone v. United States, 299 U.S. 476, 496;

Seaboard v. United States, 261 U.S. 299;

Jacobs v. United States, 290 U.S. 13, 16, 17;

Brown v. United States, 263 U.S. 78

B. The Denial of the Right to Impeach Sergeant Kenneth Cable Constitutes a Denial of Due Process of Law.

A denial of a right to impeach a prosecution witness with respect to a material matter constitutes a denial of due process of law.

Due process of law is offended if there is

denied an adequate opportunity to defend against a criminal charge.

Collins v. Superior Court, 145 Cal. App. 2d 588, 594.

Due process of law requires the observance of the established rules of procedure.

People v. Gilbert, 25 Cal. 2d 422.

People v. O'Bryan, 165 Cal. 55

The right of a defendant to confront prosecution witnesses includes the right to cross-examine them.

People v. Humme, 56 Cal. App. 2d 262;
("A full cross examination is not a matter of privilege, it is a matter of absolute right.")

People v. Ward, 105 Cal. 652.

C. The Trial Court Refused to Permit the Petitioner to Introduce Evidence That the Writ of Possession Resisted by the Defendant/Appellant Was Based on a Void Judgment.

Since a battery cannot be committed in self defense, it would follow that any action of the trial court in restricting the defendant from offering evidence that the alleged battery committed by her, was in fact committed in resisting an unlawful eviction would be error. A battery cannot be committed in self defense or in defense of his premises.

People v. McDonnell, 32 Cal. App. 694, 704;

People v. Hubbard, 64 Cal. App. 27;

Lorenze v. Hunt, 89 Cal. App, 6, 12;

Phelps v. Arnold, 112 Cal. App. 518;

Blocker v. Chanslor, 153 Cal. 118.

If the attempted enforcement of the writ of possession was unlawful the deputy sheriffs became the aggressors. See,

People v. Hardwick, 204 Cal. 582, 587.

In People v. Ross, 19 Cal. App. 469, 474, the court there held that a city recorder who attempted to enter a home with the avowed

intention of unlawfully entering and searching for whiskey, constituted an invasion and injury to the rights of the Defendant; and that under Section 692 and 694 Penal Code, the defendant was entitled to employ sufficient resistance to prevent the commission of the offense.

See also, 693 of the Penal Code, declaring that resistance sufficient to prevent an offense against his person or his family or some member thereof, may be made by the party about to be injured, likewise, that such resistance may be made to prevent an illegal attempt by force to take or injure property in his lawful possession.

Although as indicated in the case of Vallindras v. Massachusetts Insurance Co., 42 Cal. 2d 149, a sheriff may be exempt from civil liability for the service of process regular on its face and issued by competent authority, neither this case nor §262. 1 of the Code of Civil Procedure would deprive a defendant of the right to prove in a criminal case that the process being enforced was void although regular on its face.

The trial court's exclusion of the evidence to prove that the writ was based on a void judgment also denied the defendant the benefit of Section 50 of the California Civil Code. This section provides that any necessary force may be used to protect from wrongful injury the person or property of oneself, or of a parent;

In Jackson v. Superior Court, 98 Cal. App. 2d 183, the parents of a child resisted an

attempted arrest and were charged with violating §148 of the Penal Code. In granting the defendants a writ of prohibition enjoining the prosecution of the case, the Appellate Court said,

> "By the express terms of the charge the obstruction must have been to the making of a lawful arrest, else the offense was not committed. If he attempts to do so, reasonable resistance may be made, either by the person he attempts to arrest or by others who may come to his aid. Here it appears no public offense was committed."

In People v. Perry, 79 Cal. App. 2d Supp. 906, the Appellate Court citing with approval from McGuire v. State, 19 Ala. App. 138, said,

> "Unless that arrest was lawful then as already stated, the officers were under no duty to make it, and resistance to their action in the matter was not a violation of §148 Penal Code. Moreover, if an arrest is unlawful, either the person being arrested or others acting in his behalf may resist the arrest, using no more than reasonable force for that purpose. This is the effect of §§692, 693 and 694 of the Penal Code, which provides that lawful resistance to the commission of a public offense may be made by the party about to be injured or by any other person in

his aid or defense, either of whom may make sufficient resistance to prevent the offense. These sections apply here because the arrest, if unlawful, is a violation of §236 Penal Code and therefore a public offense."

To the same effect are the following cases, each holding resistance can be made to an unlawful arrest or to the service of invalid process:

Brown v. U.S., 47 F. 2d 681;

U.S. v. Sands, 14 F. 2d 670;

Sparks v. U.S., 90 F. 2d 61;

U.S. v. Pittoto, 267 F. 603;

Cooper v. U.S., 299 F. 483;

Magnaud v. Traeger, 66 Cal. App. 526;

Allen v. Clark, 22 F. Supp. 898;

People v. Teung, 92 Cal. 421;

People v. Manriquez, 138 Cal. App. 614;

People v. Rivera, 24 Cal. App. 531.

Consistent with these cases it is held that the burden of proof in a criminal case under

§148 of the Penal Code is to both plead and prove that the court had jurisdiction to issue the process, People v. Craig, 59 Cal. 370. This case has never been overruled.

Assuming that the Writ of Possession being enforced by the deputy sheriffs in th case was invalid, the Petitioner herein was arrested unlawfully for having committed a battery resisting an unlawful ejectment. The error made by the trial court was in concluding that there was a presumption that the Writ was a lawful writ and could not be subjected to a collateral attack. (Clk. Tr. p. 169, line 1 to p. 171, line 26).

In Sarafian v. The City and County of San Francisco, 143 Cal. App. 2d 570, police officers attempted to batter down a door of the plaintiff's home and forcibly enter it for the purpose of causing an arrest and the Appellate Court there said, "This admitted conduct was clearly tortious unless there was legal justification for it, as to which the burden of proof was on the defendants." (Emphasis added) The court citing Dragna v. White, 45 Cal. 2d 469, 471.

Even in a civil case the writ is only prima facie proof of the authority of the levying officer.. Brichman v. Ross, 67 Cal. 601, 605. The three counts of battery as well as the count for disturbing the peace, were based on an arrest without a warrant, while the Defendant was resisting an illegal eviction by the sheriff in enforcing a void writ of possession. The trial court thus deprived the Defendant not only of the benefits of Sections 692, 693 and 694 of

the Penal Code, and similarly deprived her of the opportunity to show that there was no justification for the arrest. It also follows that this action not only deprived her of these defenses but permitted the deputy sheriffs as arresting peace officers to maintain the burden of proof without proving lawful justification for the arrest.

It was the contention of the Petitioner in Petitioner's motion challenging the jurisdiction of the Municipal Court to proceed with the case against either of the two original defendants among other defenses, "that the battery which the defendants are alleged to have committed does not constitute a violation of Section 148 of the Penal Code, in that the battery, if any, was committed in resisting an unlawful arrest." (Rep. Tr. p. 7, lines 20-23). Thus the defendant argued, "The burden of proof in this case is upon the prosecution to show that they have a valid judgment." (Clk. Tr. p. 150, line 14; 155, lines 12-20; p. 156, lines 3-20; p. 171, lines 12-26; p. 181, line 8 to 182, line 22; p. 490, line 23 to 494, line 24).

These batteries arose when Petitioner attempted to resist her ejectment from the premises. Thus the same burden of proof was imposed on the prosecution in this case to prove that the Petitioner in the commission of the alleged battery and disturbance of the peace had committed the acts without provocation and without the immunity attached to §§692, 693 and 694 of the California Penal Code. Particularly is this true when the Petitioner timely raised the issue that she resisted being

evicted under circumstances which indicate that the sheriffs in question were seeking to enforce a Writ of Possession, based upon an alleged void judgment.

D. The Writ of Possession Was Based on a Void Judgment.

The defendant offered into evidence in behalf of the defense that the writ was based upon a void judgment on file in Superior Court case 586 229. The Writ of Possession in this case was based upon a final order of condemnation entered in the former action. This file was offered for the purpose of showing that the interlocutory decree of condemnation had been rendered against the parents of the Petitioner, Manuel and Avrana Arechiga, in a condemnation case and that within three (3) weeks of the entry of the interlocutory decree of condemnation upon application of the plaintiff in this action ex parte and without notice to the Defendants or their Counsel, the Housing Authority of the City of Los Angeles had applied for and obtained prematurely a final order of condemnation by depositing the principal amount of the award but not including interest. (Clk. Tr. p. 133, line 10 to p. 147, line 19; p. 473, line 9 to p. 476, line 26; p. 494, line 13; p. 511, lines 11-14; p. 521, lines 6-8.)

E. A Final Order of Condemnation Entered Before the Interlocutory Decree Becomes Final and Without a Deposit of Interest Having Been Made is a Void Order and Any Writ of Possession Thereafter Issued is a Void Writ.

Petitioner offered to prove by the introduction of the Superior Court file, 586, 229, and of the witness, Frank P. Picare, Assistant Trust Officer in the County Clerk's office, the following:

On February 20, 1953, an interlocutory decree of condemnation was rendered in case number 586, 229, awarding Avrana Arechiga and Manuel Arechiga the sum of $10, 050. 00 and costs of suit.

On March 12, 1953, the Housing Authority deposited with the County Clerk the sum of $10, 057. 45. This sum represented the principal amount of the award and costs of suit but did not include any interest. (Rep. Tr. p. 475, to p. 476, line 26).

On March 16, 1953, the Housing Authority obtained a final order of condemnation which was entered on March 19, 1953. (This final order was obtained ex parte without notice to the Arechigas or their Counsel) (Tr. p. 615 line 10 to 616, line 7).

A final order of condemnation may not be

entered without the payment of the award including interest.

People v. Loop, 161 Cal. App. 2d 466, 479;

People v. Superior Court, 145 Cal. App. 2d 683, 687;

Bellflower v. Skaggs, 52 A. C. 290.

The Writ of Possession obtained by the City of Los Angeles in which the Petitioner was evicted from the home of her parents was therefore based on a void final order entered without compliance with the necessary conditions precedent to support such an order. Payment of the award including interest was a condition precedent to vesting title to the condemner.

The enforcement of a Writ of Possession without having deposited or paid the accrued interest on the award constitutes the taking of private property without just compensation in violation of the Fourteenth Amendment of the United States Constitution and of the due process clause of the California Constitution. Since the condemnor, Housing Authority had not deposited interest with the County Clerk on the interlocutory judgment rendered in favor of the Arechigas the interlocutory judgment not having been complied with never became final and the plaintiff in that action was not entitled to the entry of a final order of condemnation.

A final order of condemnation may not be entered prematurely merely because the condemnor deposits the principal amount into court since the condemnor may still abandon the proceeding at any time before expiration of thirty (30) days after final judgment.

§1255a Code of Civil Procedure;

Bellflower v. Skaggs, 52 A. C. 290, 293;

Pool v. Butler, 141 Cal. 46.

Title remains in the owner until the award including interest is paid

Petitioner was denied a fair trial by the refusal of the court to permit Petitioner to introduce evidence tending to establish the invalidity of the Writ of Possession. This ruling deprived Petitioner of a defense to the charges of battery and constituted a denial of an essential element of a fair trial or due process of law.

People v. Sarazzawski, 27 Cal. 2d 7, 11.

F. The Trial Court Refused to Permit the Petitioner to Introduce Evidence that She Was Subjected to Cruel and Unusual Treatment by the Arresting Officers.

For the purpose of showing that the court lacked jurisdiction to try the Petitioner of any of the charges pending against her, the Petitioner objected to the jurisdiction of the Court. The ground upon which this motion was made was that cruel and unusual treatment had been inflicted upon the Petitioner by officers of the Sheriff's Department and of the Police Department in violation of the Fourteenth Amendment of the United States Constitution and of Article I, Section VI of the California Constitution. (Tr. p. 130, lines 3-17).

The court sustained an objection to the introduction of the evidence offered by the Petitioner to show the conduct regarded as cruel and unusual punishment. (Tr. p. 157, line 6 to p. 302, line 8; p. 337 to p. 354; p. 375, line 15 to p. 383, line 18).

In Johnson v. Dye, 175 F. 2d 250, the United States Court of Appeals after reviewing the authorities on the question of cruel and unusual punishment to prisoners said,

> "But we entertain no doubt that the Fourteenth Amendment prohibits the infliction of cruel and unusual

punishment by a state. We are of the opinion that the right to be free from cruel and unusual punishment at the hands of a state is as 'basic' and 'fundamental' a one as the right of freedom of speech or freedom of religion. And it should be pointed out that actions of the employees of the prison system of Georgia must be deemed to be those of the state of Georgia. The fact that a state officer acts illegally cannot relieve a state of responsibility for his act. * * *

"It follows, therefore, that Johnson must be set at liberty for the State of Georgia has failed signally in its duty as one of the sovereign States of the United States to treat a convict with decency and humanity. It must be pointed out also that she has failed also to observe the explicit mandates of her own Constitution which pointedly, as if the very evil here under consideration was in mind, go as far, if not farther, than those of the Eighth Amendment to the Constitution of the United States."

In the present case the conduct complained of, to wit, the handcuffing of the Defendant with great force with her arms behind her back, striking the Defendant over the mouth, causing her mouth to bleed, closing the window of the door of the automobile in which she was pushed into, so that the window cut into her shinbone

and injured her leg, closing the windows of the automobile on an extremely warm day over the complaints of the Petitioner that she could not breathe, refusing to give the Petitioner water upon her request, refusing to permit the Petitioner to go to a bathroom upon her request, detaining the Petitioner in handcuffs for a period of approximately four (4) hours before transporting her to a jail or as in this case, to a receiving hospital, all following an arrest for an alleged misdemeanor spells out cruel and unusual punishment and a violation of the Petitioner's rights protected by the Fourteenth Amendment of the United States Constitution.

In the Johnson case the Court of Appeals had no hesitation in holding that the cruel and unusual punishment inflicted upon the Defendant so abridged a fundamental right that it amounted to a denial of due process.

CONCLUSION

It is respectfully submitted that this case warrants the interposition of the United States Supreme Court on the important Constitutional questions herein raised and to prevent a gross miscarriage of justice.

Respectfully submitted,

PHILL SILVER

Attorney for Petitioner

"APPENDIX A"

DECISION OF
APPELLATE DEPARTMENT
SUPERIOR COURT

In the Appellate Department of the Superior Court, County of Los Angeles, State of California.

PEOPLE OF THE STATE OF CALIFORNIA Plaintiff and Respondent, vs. MRS. AURORA VARGAS, Defendant and Appellant.

Appeal by defendant from judgment of the Municipal Court of the Los Angeles Judicial District, Byron J. Walters, Judge. Affirmed as to Counts I, II and III; reversed as to Count IV.

For Appellant -- Phill Silver, Esq.

For Respondent -- Roger Arnebergh, City Attorney; Philip E. Grey, Assistant City Attorney; William E. Doren, Deputy City Attorney.

The defendant was convicted of three counts of battery, the victims of which were three deputy sheriffs, a different victim being named in each count. She was also convicted of disturbing the peace. The unpleasantness arose when the officers served a writ of possession in a civil action upon our defendant. She resisted the enforcement of the writ by kicking, striking

or biting each of the officers. In a fourth count she was convicted of disturbing the peace by the same misconduct which constituted battery.

Penal Code 654 provides: "An act or omission which is made punishable in different ways by different provisions of this Code may be punished under either of such provisions, but in no case can it be punished under more than one; . . ." The judgment on count IV (disturbing the peace) must be reversed by reason of this section, battery being a graver offense, on the basis of possible punishment, than disturbing the peace.

We have considered and found without merit all of the grounds urged by appellant for reversing the judgment on the battery counts. This court, by express provision of Judicial Council Appellate Department Rule 6, is not required to write an opinion in any case, but we will discuss one point raised by the appellant, to-wit: the claim that the defendant was entitled to resist the service of the writ because it was based on a void judgment. We do not know whether the judgment was void but we do know that the writ, a copy of which is in evidence, is valid on its face. This was sufficient to protect the officers who served it. In Vallindras v. Massachusetts, etc. Ins. Co. (1954), 42 Cal. 2d 149, the court said at page 154: "The validity of a judgment of commitment, where the question is a close one, as is true here, is ultimately for the courts, not the sheriff, to decide. A sheriff is a ministerial or executive, not a judicial, officer [citing cases]. It is his duty to execute the orders of the court unless they are patently irregular and void. In determining whether

process and orders are 'regular on their face' so far as the liability of such an officer is concerned, the following statement from Aetna Ins. Co. v. Blumenthal (1943), 129 Conn. 545, 553 [29 A. 2d 751, 754] is pertinent: 'When we speak of process "valid on its face," in considering whether it is sufficient to protect an officer, we do not mean that it's upon the basis of scrutiny by a trained legal mind; nor is it to be judged in the light of facts outside its provisions which the officer may know. [Citations.] Unless there is a clear absence of jurisdiction on the part of the court or magistrate issuing the process, it is sufficient if upon its face it appears to be valid in the judgment of an ordinarily intelligent and informed layman. To hold otherwise would mean that an officer must often act at his peril or delay until he has had an opportunity to search out legal niceties of procedure and, as said in Anderson v. Dewey [(1917), 91 Conn. 510, 514 [100 A. 99]] ..., "A result subjecting him to constant danger of liability would be an intolerable hard ship to him, and inevitably detract from the prompt and efficient performance of his public duty." As was pointed out in Robinette v. Price, (1943), 214 Minn. 521 [8 N. W. 2d 800, 805, 806], 'All that is required to make process fair on its face is that it must proceed from a court having jurisdiction of the subject matter and that it contain nothing which ought reasonably to apprise the officer that it was issued without authority. [Citations.] ...'."

Appellant seeks to distinguish that case on the ground that it is a civil action for damages and ours is a criminal action, but there is no

reason why an officer who serves a writ of possession valid on its face does not have protection from physical violence as well as from civil liability for serving the process.

Appellant cites numerous cases which hold that a person has a right to resist an unlawful arrest. Those cases are based on an arrest or an attempted arrest without a warrant under conditions where the law does not authorize an arrest without the warrant. Examples of those cases are Jackson v. Superior Court (1950), 98 Cal. App. 2d 182; People v. Perry (1947), 79 Cal. App. 2d Supp. 906; Sarafini v. City and County of San Francisco (1956), 143 Cal. App. 2d 570.

We hold that when an officer is armed with a writ of possession lawful on its face a person who resists the officer seeking to execute it is guilty of a crime. The court room in the civil action, not the place where the writ is served, is the proper battle ground for testing the validity of the court order.

The judgment on counts I, II and III is affirmed. The judgment on Count IV is reversed.

Dated March 28, 1960.

SWAIN
Presiding Judge

We concur:

HULS, Judge
SMITH, Judge